Supreme Court, U. S.
FILED
JAN 12 1977
MICHAEL RODAK, JR., CLERK

No. 76-503

In the Supreme Court of the United States

OCTOBER TERM, 1976

CLARENCE J. MATYA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App.) is reported at 541 F. 2d 741.

JURISDICTION

The judgment of the court of appeals was entered on September 9, 1976. The petition for a writ of certiorari was filed on October 8, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the application for an order authorizing interception of petitioners' telephone conversations sufficiently established that other investigative procedures were inadequate.

2. Whether 18 U.S.C. 1955, prohibiting the conducting of an illegal gambling business, was constitutionally applied in this case.

STATUTES INVOLVED

18 U.S.C. 1955 provides in pertinent part:

> (a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.
>
> (b) As used in this section—
>
> (1) "illegal gambling business" means a gambling business which—
>
> (i) is a violation of the law of a State or political subdivision in which it is conducted;
>
> (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and
>
> (iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.
>
> * * * * *

18 U.S.C. 2518 provides in pertinent part:

> (1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

> * * * * *
>
> (c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;
>
> * * * * *

STATEMENT

Following a jury trial in the United States District Court for the District of Nebraska, petitioners were convicted of operating an illegal gambling business in violation of 18 U.S.C. 1955.[1]

The evidence showed that Clarence Matya managed a bookmaking and gambling operation (G. Exs. 20, 20-B, 100-134), and Helen Matya kept the books and records of the operation and sometimes accepted telephone wagers (G. Exs. 20, 20-B, 100, 101; Tr. 1896-1899, 3297, 3300, 3309, 3317). Petitioners Abboud and Moran manned the central telephones of the business, receiving bets and giving "line" information (G. Exs. 10, 10-B, 11, 11-B, 12, 12-B, 14, 14-B, 15, 15-B, 16, 16-B, 17, 17-B, 20, and 20-B; Tr. 1608-1701). Petitioners Walker (G. Exs. 10, 10-B; Tr. 1313-1607), Chonis (Tr. 2103-2243) Quinn (G. Exs. 16, 16-B; Tr. 2566-2571), Urzendowski (G. Ex. 14, 14-B; Tr. 2335-2351, 2372,

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[1]Petitioner Clarence Matya was sentenced to two years' imprisonment. Petitioner Helen Matya was sentenced to three years' imprisonment, suspended in favor of probation, and was fined $2,000. Petitioners Abboud, Moran and Walker were sentenced to three years' imprisonment, all but six months of which were suspended in favor of probation. Petitioner Stanek was sentenced to three years' imprisonment, all but ninety days of which was suspended in favor of probation. Petitioners Chonis, Urzendowski, Matulka, and Quinn were sentenced to three years' imprisonment, all but thirty days of which was suspended in favor of probation.

2382), and Matulka (G. Exs. 15, 15-B; Tr. 2281-2283) accepted wagers, relayed them to those manning the telephones, and settled wagering accounts with the bettors. Petitioner Stanek collected money and also took telephone wagers (G. Exs. 12, 12-B; Tr. 2027-2028, 2033-2034, 2042-2048, 2612-2620).

At trial, the government introduced tape recordings of telephone conversations concerning petitioners' bookmaking operation. The recordings were obtained by means of wire interceptions authorized by an order of the district court upon the government's application.

ARGUMENT

1. Petitioners argue that the evidence derived from the wire interceptions should have been suppressed because the government's application for authorization of the interceptions failed to comply with the requirements of 18 U.S.C. 2518(1)(c). That provision requires that an application for authorization of a wire interception must set forth "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous."[2] The requirements of 18 U.S.C. 2518(1)(c) are met when, viewed in a practical and common sense fashion (S. Rep. No. 1097, 90th Cong., 2d Sess. 101 (1968)), the application and its supporting affidavit are sufficient to demonstrate to the court that traditional

[2]18 U.S.C. 2518(3)(c) requires that, prior to authorizing the interception of wire communications, the court must determine, on the basis of the facts set forth in the application, that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous." Although petitioners raise as part of their questions presented for review the issue whether there was compliance with 18 U.S.C. 2518(3)(c), they do not argue that issue. In any event, the court made the appropriate finding (Pet. App. 4a) and, as we show below, the government's application for the order provided an ample basis for the finding.

investigative techniques would not suffice to expose the crime. See, *e.g.*, *United States* v. *Kahn*, 415 U.S. 143, 153 n. 12; *United States* v. *Robertson*, 504 F. 2d 289, 293 (C.A. 5), certiorari denied, 421 U.S. 913; *United States* v. *Brick*, 502 F. 2d 219, 224 (C.A. 8).

The court of appeals properly found that test satisfied here (Pet. App. 5a-9a). As the court of appeals stated (Pet. App. 6a), the affidavit supporting the application "revealed six months of prior investigative activity in this case, all of which had failed to reveal the scope of operations or the identity of individuals involved."[3]

[3]The contents of the affidavit are summarized by the court of appeals as follows (Pet. App. 5a-6a; footnote omitted):

> Paragraph 4 [which consisted of approximately 13 pages] of the affidavit submitted in this case set forth a history of physical surveillance at various locations in the Omaha area, including the residence at which the target phones were located and a number of local bars from which much of the betting allegedly occurred. It also set forth information supplied by a total of seven confidential informants, all of whom were unwilling to testify for fear of their personal safety. It related the results of an interview with Clarence John Mayta [*sic*], the central figure in the alleged illegal gambling enterprise. It also revealed the examination of various telephone, motor vehicle and police records. In short, it substantiated in detail a statement in paragraph 5 of the affidavit that standard investigative techniques had been utilized over a six-month period.
>
> Paragraph 5 of the affidavit represented that continued use of standard investigative techniques "would succeed only to a limited degree" in establishing the scope and nature of the illegal gambling operations and the identity of other individuals involved therein. This conclusion was based on the "secretive and guarded manner in which this gambling conspiracy is being conducted" and on the affiant's evaluation of the circumstances "in light of [his] experience * * * in the investigation of gambling cases * * *." The remainder of paragraph 5 detailed investigative problems commonly encountered in gambling cases, including the likely destruction

Petitioners suggest (Pet. 18-20) that the affidavit was inadequate because it failed to show that certain specific investigative techniques—grants of immunity and search warrants—had not been attempted or were unlikely to succeed. The courts have generally recognized, however, that the application need not show that normal investigative techniques have been tried unless there is a reasonable likelihood that, if tried, such techniques would be successful. *United States* v. *Pacheco*, 489 F. 2d 554, 565 (C.A. 5), certiorari denied, 421 U.S. 909; *United States* v. *Falcone*, 364 F. Supp. 877, 889 (D. N.J.), affirmed, 505 F. 2d 478 (C.A. 3), certiorari denied, 420 U.S. 955.[4] Moreover,

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of records and the difficulty in interpreting records even if seized.

Elsewhere, the affidavit recited that "[c]onstant access to a telephone is necessary for the successful operation of a bookmaking business." The affidavit as a whole substantiated this allegation as applied to the facts at hand.

[4]Petitioners rely heavily on *United States* v. *Kalustian*, 529 F. 2d 585 (C.A. 9), in suggesting that the affidavit here was insufficient. It is significant that the language in that opinion upon which they rely in defining the scope of the government's duty imposed by Section 2518(1)(c) was deleted in the amended opinion issued by the panel on December 11, 1975. The amended opinion specifically recognizes that "Congress did not require exhaustion of 'all possible' investigative techniques before orders for wiretaps could be issued." 529 F. 2d at 590.

As we noted most recently in our brief in oppostion to the petition for certiorari in *Feldman* v. *United States*, No. 76-113, certiorari denied, November 8, 1976, *Kalustian* appears to have interpreted Section 2518(1)(c) to require greater specificity in affidavits supporting interception applications than have other panels of the Ninth Circuit or panels of other circuits. It has not been followed in other circuits or applied consistently in the Ninth; accordingly, we do not believe that any inconsistency in the interpretation of Section 2518(1)(c) created by *Kalustian* is of sufficient importance to warrant review by this Court.

Finally, the court below specifically concluded that the affidavit here was substantially more comprehensive than the one involved in *Kalustian* (Pet. App. 6a-7a); it is not at all clear that the *Kalustian* panel would have found this affidavit inadequate.

while the affidavit in this case did not explicitly discuss immunity grants, the facts contained in the affidavit did show that such grants were not likely to succeed in the particular circumstances of this investigation.[5]

After thorough consideration of petitioners' contentions, the district court and the court of appeals found the government's application to be sufficient; further review of this largely factual determination is not warranted.

2. Petitioners advance a two-pronged attack on the constitutionality of 18 U.S.C. 1955.

1. First, they contend (Pet. 24-25) that by incorporating by reference the law of the state in which gambling activities occur, Section 1955 "operates so unequally as to violate the due process clause." Congress may, however, constitutionally exercise its powers in a manner calculated to conform to local policy by incorporating relevant state laws by reference. *E.g.*, *United States* v. *Sharpnack*, 355 U.S. 286; *Kentucky Whip & Collar Co.* v. *Illinois Central R. Co.*, 299 U.S. 334. The validity of the incorporation by reference of state law in 18 U.S.C. 1955 has been consistently upheld by the courts of appeals. *E.g.*, *United States* v. *Morrison*, 531 F. 2d 1089 (C.A. 1); *United States* v. *Hawes*, 529 F. 2d 472 (C.A. 5); *United States* v. *Sacco*, 491 F. 2d 995 (C.A. 9).

b. Petitioners also argue (Pet. 25-27) that "18 U.S.C. §1955 is defective because it does not require proof of a specific effect on interstate or foreign commerce flowing

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[5]The affidavit shows that the interrogation of witnesses under grants of immunity was not likely to be productive because it was fear for their personal safety, not concern about possible prosecution, that prompted their unwillingness to testify (Pet. App. 5a). The use of conventional search warrants was discussed; that technique was not feasible, since the operation was conducted in extreme secrecy and the one-time recovery of physical evidence was unlikely to reveal the full scope of the gambling operation (*ibid.*).

from the prohibited gambling venture." Congress, however, had ample support for concluding that illegal gambling is a kind of activity that has an effect upon interstate commerce. See *United States* v. *Harris*, 460 F. 2d 1041, 1044-1048 (C.A. 5), certiorari denied, 409 U.S. 877; *United States* v. *Cappetto*, 502 F. 2d 1351 (C.A. 7), certiorari denied, 420 U.S. 925; *United States* v. *Sacco*, *supra*. Since regulation of the kind of activity dealt with in 18 U.S.C. 1955 is a valid exercise of the power of Congress to regulate interstate commerce, and since petitioners' gambling operation fell within the regulated class, the fact that their particular activities were not shown to affect interstate commerce is immaterial. *Perez* v. *United States*, 402 U.S. 146.[6]

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1977.

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[6]As the court of appeals found (Pet. App. 15a-16a n. 15), petitioners' reliance upon *Rewis* v. *United States*, 401 U.S. 808, is misplaced. *Rewis* involved 18 U.S.C. 1952, which prohibits interstate travel with the intent to carry on illegal gambling activity. The travel of the defendants' customers in *Rewis* was insufficient to support a prosecution under that statute. In contrast, 18 U.S.C. 1955 contains no interstate travel requirement.